

May 4, 1995

Jeremy T. Harrison
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University of Hawaii at Manoa
2515 Dole Street
Honolulu, Hawaii 96822

Dear Mr. Harrison:

Re: Identity of Applicants for Admission to
the Law School

This is in reply to your letter dated November 28, 1994
requesting an advisory opinion concerning the above-referenced
matter.

ISSUES PRESENTED

I. Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the names of individuals who have applied for admission to the William S. Richardson School of Law ("Law School"), but who have not yet been admitted or enrolled, must be made available for public inspection and copying upon request.

II. If the names of Law School applicants are protected from public disclosure under the UIPA, which employees within the Law School or the University of Hawaii ("University") may be informed of the identity of applicants for admission to the Law School.

BRIEF ANSWERS

I. No. Under the UIPA, an agency is not required to disclose "government records, which if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-13(1) (Supp. 1992). The UIPA's legislative history explains that this exception only applies if the individual has a "significant" privacy interest in the government records or information in question. Furthermore, under the UIPA, the disclosure of a government record does not constitute a clearly unwarranted invasion of personal privacy if the individual's

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privacy interest is outweighed by the public interest in disclosure. Haw. Rev. Stat. § 92F-14(a) (Supp. 1992).

Our research has revealed no state court decision or attorney general opinion on the issue of whether the disclosure of the identities of applicants for admission to a university or graduate program would constitute an invasion of privacy. Further, the disclosure of this information is not governed by the federal Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (1988) ("FERPA") because FERPA only applies to the education records of individuals who have been or are in attendance at an educational institution, and does not apply to individuals having the status of applicants for admission.

Nevertheless, it is the opinion of the OIP that individuals who apply for admission to a university or graduate program have a significant privacy interest in that fact and the status of their application. A decision to admit an applicant to a university or graduate program involves a critical assessment of the applicant's scholastic record, scholastic achievement test scores, personal achievements, and other factors.

Additionally, because in our opinion the public interest in the disclosure of the identities of Law School applicants does not outweigh the individual's privacy interest in this information, we conclude that this information should be withheld from public disclosure under the UIPA's clearly unwarranted invasion of personal privacy exception. Haw. Rev. Stat. § 92F-14(a) (Supp. 1992).

II. While the uniform law upon which the UIPA was modeled does not regulate the intra-agency use and disclosure of government records, in OIP Opinion Letter No. 94-16 (Sept. 2, 1994) we opined that information that is protected from disclosure by the UIPA's "clearly unwarranted invasion of personal privacy" exception should only be disclosed to those officers or employees of the agency that have an official "need to know" in the performance of their duties. For example, members of the Law School Admissions Committee, who review applications for admission, clearly have an official need to know in the performance of their duties. The extent to which other officers or employees of the Law School or the University are entitled to receive this information depends upon an examination of whether they have an official need to know in the performance of their job duties.

Finally, we observe that the identities of individuals who have applied for admission to the Law School may be disclosed to other government agencies only to the extent permitted by section 92F-19(a), Hawaii Revised Statutes, which restricts the

inter-agency disclosure of records that are otherwise confidential under the UIPA and sets forth legal standards under which inter-agency disclosure is authorized.

FACTS

In your letter to the Office of Information Practices ("OIP"), you state that every year the Law School receives inquiries from persons, other than the applicants for admission to the Law School, seeking information about or expressing an interest in a particular applicant for admission. You stated that the Law School is concerned about the propriety of these inquiries and the Law School's responsibilities under the circumstances.

DISCUSSION

I. INTRODUCTION

The UIPA provides that "[e]xcept as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours." Haw. Rev. Stat. § 92F-11(b) (Supp. 1992).

Under the UIPA, the term "government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat.

§ 92F-3 (Supp. 1992).

Admission records maintained by the Law School are "government records" for purposes of the UIPA, since the Law School is an "agency" for purposes of the UIPA. See Haw. Rev. Stat. § 92F-3 (Supp. 1992); OIP Op. Ltr. No. 89-9 (Nov. 20, 1989) (Law School is an "agency" for purposes of the UIPA).

Furthermore, since the names of individuals who have applied for admission to the Law School are contained in records possessed or maintained by the Law School, the provisions of the UIPA govern the public, and intra-agency and inter-agency disclosure of this information, because the names of applicants constitute "information maintained by an agency . . . in [some] physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1992) (definition of "government record"). We now turn to a consideration of whether the identities of Law School applicants are protected from disclosure under the UIPA.

II. COMPLIANCE WITH UIPA WAIVED WHEN COMPLIANCE WOULD RESULT IN THE LOSS OF FEDERAL FUNDING, SERVICES, OR OTHER ASSISTANCE

As provided in section 92F-4, Hawaii Revised Statutes, an agency's compliance with the provisions of the UIPA is waived to

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the extent that such compliance would cause an agency to lose federal funding, services, or other assistance from the federal government.

State educational agencies and institutions that receive federal funding, including the University of Hawaii, must comply with the funding restrictions of the Federal Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA").¹ Among other things, FERPA prohibits (with qualified exceptions) educational agencies receiving federal funding from disclosing the "education records" of "students" without the consent of the students' parents. In the case of students that have attained the age of 18 ("eligible students"), consent is required from those students for the disclosure of their education records.

Individuals who have applied for admission to an educational agency or institution subject to FERPA, but who have not been in attendance at the educational institution or agency, are not "students" for purposes of the FERPA. See 20 U.S.C. § 1232g(a)(6) (1988); 34 C.F.R. §§ 99.3, 99.5(c) (1994); Tarka v. Franklin, 891 F.2d 102 (5th Cir. 1989) (individual denied admission to a graduate school is not a "student"); Carl v. Board of Regents of University of Oklahoma, 577 P.2d 912 (Okla. 1978) (medical school admissions process not governed by FERPA's restrictions); see also John E. Theuman, Annotation, Validity, Construction, and Application of the Family Educational Rights and Privacy Act of 1974 (FERPA) 112 A.L.R. Fed. 1 (1993).

Accordingly, where a student has applied for admission to the Law School, but has not been or is not in attendance at the Law School (for example where the admission application is under review or consideration), the disclosure restrictions of FERPA would not apply. Conversely, where an applicant for admission to the Law

¹The legislative history of section 92F-4, Hawaii Revised Statutes, indicates that of principal concern to the Legislature was the possibility that an agency's compliance with the UIPA might run afoul of FERPA, and other federal laws, that condition federal funding and assistance upon compliance with restrictions on the disclosure of information. The Legislature noted that "[c]ompliance with the UIPA may seriously jeopardize federal funding for the University of Hawaii if this waiver is not provided." H. Stand. Comm. Rep. No. 1725-82, 16th Leg., 1992 Reg. Sess., Haw. H.J. 1564 (1992); see also S. Stand. Comm. Rep. No. 2014, 16th Leg., 1992 Reg. Sess., Haw. S.J. 963 (1992).

School is subsequently admitted and is or has been in attendance at the Law School, the disclosure restrictions of FERPA would apply to that student's educational records. However, once an individual is in attendance at the Law School, the Law School may disclose student "directory information," to the extent that it has complied with FERPA's restrictions governing the disclosure of student directory information.

We now turn to an examination of whether the identities of individuals who have applied for admission to the Law School, but who have: (1) not been admitted, or (2) have been admitted, but have not been in attendance, are protected from disclosure under section 92F-13, Hawaii Revised Statutes.

III. CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY

Under the UIPA, an agency is not required to disclose "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-13(1) (Supp. 1992).

The UIPA's "clearly unwarranted invasion of personal privacy" exception requires the balancing of the public interest in disclosure against any privacy interest affected. According to the UIPA, "[d]isclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual." Haw. Rev. Stat. § 92F-14(a) (Supp. 1992); see also Haw. Rev. Stat. § 92F-2 (Supp. 1992) (purpose of the UIPA is to "balance the individual privacy interest and the public access interest, allowing disclosure unless it would constitute a clearly unwarranted invasion of personal privacy").

The UIPA's legislative history also reflects that "[i]f the privacy interest is not 'significant,' a scintilla of public interest in disclosure will preclude a finding of a clearly unwarranted invasion of personal privacy." S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988).

In section 92F-14(b), Hawaii Revised Statutes, the Legislature set forth examples of government records, or information contained therein, in which an individual is deemed to possess a significant privacy interest.² None of the examples provided encompass

²Section 92F-14(b), Hawaii Revised Statutes, also identifies information in which an individual does not possess a significant privacy interest. This information is subject to disclosure as if it were a part of the enumeration of records in section

information that is the subject of this opinion, namely, the identity of an individual who has applied for admission to the Law School. Nevertheless, we believe that section 92F-14(b), Hawaii Revised Statutes, was not intended to be an exhaustive listing of records in which an individual has a significant privacy interest.

First, section 92F-14(b), Hawaii Revised Statutes, merely identifies "examples." Further, the UIPA's legislative history suggests that "case law under the Freedom of Information Act should be consulted for additional guidance." S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1094 (1988).

Our research has not disclosed any federal or state court decisions or Attorney General opinions finding that applicants for admission to a university or college have a significant privacy interest in the fact or status of their application for admission.

Thus, the issue presented is one of first impression, as far as the OIP can determine.³

A decision to admit an individual to an institution of higher learning involves an examination of the individual's previous scholastic records, achievements, scholastic aptitude test scores (such as the SAT, LSAT, GRE, and others), employment history, community service, letters of recommendation, the applicant's personal statement, and other factors.

Moreover, were we to conclude that the identities of applicants to University programs must be publicly accessible, it would follow that the identities of at least some⁴ individuals who have been denied admission to the University would also be readily ascertainable by comparing a student directory to lists of persons who have applied for enrollment. We believe that private citizens have a reasonable expectation of privacy, or a significant privacy

92F-12, Hawaii Revised Statutes, that must be made available for inspection during regular business hours. See Haw. Rev. Stat. § 92F-14(b)(1), (2), (4), (5), and (7) (Supp. 1992) and (Comp. 1993).

³In Porton v. University of San Francisco, 134 Cal. Rptr. 839 (1976), however, the court held that a university's disclosure of a student's transcript of grades the student received at another university to a state scholarship and loan commission stated a cause of action of invasion of privacy under the right to privacy provisions of the Constitution of the State of California.

⁴Some individuals who have been invited to attend the law school might decline the invitation to pursue legal studies at other law schools.

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interest in the fact that they have been denied admission to a university or graduate program, because a decision not to admit an individual involves the assessment of personal qualities and characteristics of the individual, such as an assessment of the individual's scholastic record, scholastic aptitude test scores, and other qualifications.

Analogously, we have previously opined that to avoid a clearly unwarranted invasion of personal privacy, agencies should not disclose the names of applicants for governmental employment who were not hired, applicants for board or commission vacancies that were not appointed, and applicants for promotion who were not promoted. See OIP Op. Ltr. No. 89-2 (Oct. 27, 1989) (executive search report pertaining to special master for corrections system); OIP Op. Ltr. No. 90-14 (Mar. 30, 1990) (certified list of eligibles); OIP Op. Ltr. No. 91-8 (June 24, 1991) (applicants for boards or commissions); OIP Op. Ltr. No. 94-8 (May 12, 1994) (records regarding applicants for promotion).

For the foregoing reasons, it is our opinion that individuals that have applied for admission to the University, or to a University graduate program, such as the Law School, have a significant privacy interest in the fact that they have applied for admission but were not admitted or enrolled.

Turning to an assessment of the public interest in disclosure under the UIPA's public interest balancing test, we have previously opined that the public interest to be considered is the public interest in the disclosure of information that sheds light upon the actions or decisions of government agencies, or their officials. OIP Op. Ltr. No. 89-16 (Dec. 27, 1989). In the usual case, this public interest "is not fostered by disclosure of information about private citizens accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." Id. at 5, quoting U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 773 (1989).

There is arguably some public interest in the disclosure of the identities of individuals who have applied for admission to the Law School, as evidenced by recent public controversy about the Law School's admissions decisions, standards, and policies. Some might argue that disclosure of the names of applicants would promote accountability by allowing the public to monitor possible favoritism in admissions decisions. However, we believe that disclosure of the names of applicants would only marginally permit the public to determine whether such favoritism exists, because to make such a determination would require the availability of confidential data concerning the qualifications of the applicants, including undergraduate grades and LSAT scores. We

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believe that the public interest in monitoring possible favoritism in the admissions process is adequately served by the disclosure of aggregate or statistical information concerning those who have been admitted, such as their place of residency, grade point averages, and LSAT scores, and undergraduate school.

Generally, disclosure of this information would reveal more about private citizens than about the actions, decisions, or operations of a government agency or its officials.⁵ Accordingly, we believe that under the UIPA's balancing test, the public interest in disclosure does not outweigh an applicant's significant privacy interest in the fact that they have applied for admission to the Law School.

Therefore, it is our opinion that without the written consent of an applicant for admission, the Law School should not publicly disclose the name of an individual who has applied for admission to the Law School to the extent that the application remains under consideration or is rejected, to avoid a clearly unwarranted invasion of personal privacy.⁶ Where an individual is admitted to the Law School, and is in attendance at the Law School, the Law School may disclose student "directory information," to the extent that the Law School complies with FERPA's restrictions relating to the disclosure of this information, including the annual publication of a notice of the types of information deemed to be directory information.

IV. INTRA-AGENCY DISCLOSURE OF THE IDENTITIES OF LAW SCHOOL APPLICANTS

You have also requested the OIP to advise you concerning who

⁵In the Reporter's Committee case, the Court observed that "[i]n this case--and presumably in the typical case in which one private citizen is seeking information about another--the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records." 489 U.S. at 773. In contrast, we have previously recognized that public employees and officials have a diminished privacy interest in information bearing upon the employees' or officials' performance of their duties, responsibilities, and functions.

⁶The conclusion would not constrain the Law School from contacting persons who have submitted letters of recommendation for an applicant, since the applicant is responsible for securing such letters of recommendation and the persons who submit letters of recommendation are obviously informed that the person has applied for admission.

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within the University, or the Law School, is entitled to know the identities of individuals who have applied for admission to the Law School.

In OIP Opinion Letter No. 94-16 (Sept. 16, 1994) we examined the extent to which government records that are protected from disclosure under the UIPA's "clearly unwarranted invasion of personal privacy" exception may be disclosed within an agency. We observed that the UIPA was modeled upon the Uniform Information Practices Code ("Model Code"), drafted by the National Conference of Commissioners on Uniform State Laws. We further observed that the commentary to the Model Code reflected that it was not intended to regulate the intra-agency use and disclosure of government records. Nevertheless, we stated:

It is the OIP's position that the UIPA does not regulate the intra-agency disclosure of confidential government records, provided that any such disclosure is to an agency officer or employee with an official need to know in the performance of their duties. The UIPA was intended to implement the individual's right to privacy under sections 6 and 7 of article I of the Constitution of § the State of Hawaii. See Haw. Rev. Stat. 92F-2 (Supp. 1992). If the UIPA freely permitted the intra-agency disclosure of government records protected from disclosure under the "clearly unwarranted invasion of personal privacy exception" this policy would clearly be frustrated.

. . . .

To illustrate, an as OIP Staff Attorney, I have no official need to know confidential information contained in the personnel records of other OIP employees. In contrast, the OIP Director does have an official need to know such information, since the Director supervises the work of all OIP employees. Similarly, the secretary to the OIP Director does have an official need to know the details of OIP employee's personnel records, since she is responsible for filing personnel records, and for transmitting personnel records to the Personnel Office of the Department of the Attorney General.

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OIP Op. Ltr. No. 94-16 at 405 (Sept. 2, 1994).

Thus, the extent to which Law School admission records may be disclosed within the University depends upon whether the persons to whom the information will be disclosed have an official need to know the information. For example, members of the Law School's Admissions Committee clearly have an official need to know the contents of Law School admission records, as would Law School staff who process admission records. Whether disclosure of Law School admission records to other employees or officials of the Law School is appropriate will depend upon whether those employees or officials play an official role in the admissions process.

We now turn to a discussion of the extent to which Law School admission records may be disclosed to other government agencies.

**V. UIPA RESTRICTIONS ON THE INTER-AGENCY DISCLOSURE OF
CONFIDENTIAL GOVERNMENT RECORDS**

Section 92F-19(a), Hawaii Revised Statutes, sets forth the circumstances under which an agency may disclose government records to other agencies.

The OIP has issued several opinion letters concerning the inter-agency disclosure restrictions of the UIPA. See generally, OIP Op. Ltr. No. 94-16 at 1-2 (Sept. 2, 1994). These restrictions only apply if the records being disclosed are protected from disclosure under section 92F-13, Hawaii Revised Statutes, usually by the "clearly unwarranted invasion of personal privacy exception." Records that are publicly available may be freely shared between government agencies. Further, as we noted in OIP Opinion Letter No. 94-16, section 92F-19, Hawaii Revised Statutes, permits, but does not require, the inter-agency disclosure of confidential government records.

Thus, information concerning applicants for admission to the Law School may be disclosed to other agencies only under the circumstances provided in section 92F-19(a), Hawaii Revised Statutes. Since the inter-agency disclosure authorizations of section 92F-19(a), Hawaii Revised Statutes, depend upon an examination of the facts surrounding an inter-agency request, we recommend that you contact the OIP for specific guidance should you have doubts as to the propriety of the inter-agency disclosure of the identities of Law School applicants.

Finally, under section 92F-19(b), Hawaii Revised Statutes, an agency receiving government records under the inter-agency disclosure provisions of the UIPA is subject to the same restrictions on disclosure of the records as the originating agency.

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CONCLUSION

For the reasons explained above, it is our opinion that the Law School should not disclose the identities of individuals who have applied for admission to the Law School without the written consent of such individuals. In our opinion, the disclosure of such information would be a clearly unwarranted invasion of personal privacy under section 92F-13(1), Hawaii Revised Statutes.

Furthermore, it is our opinion that information concerning the identities of individuals who have applied for admission to the Law School should be disclosed only to those individuals within the Law School or the University with an official need to know in the performance of their duties.

Finally, this information may be disclosed to other government agencies, only to the extent permitted by section 92F-19(a), Hawaii Revised Statutes, which restricts the inter-agency disclosure of government records that are confidential under the UIPA.

Please contact me at 586-1404 if you should have any questions regarding this opinion.

Very truly yours,

Hugh R. Jones
Staff Attorney

APPROVED:

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